Office of the State Appellate Defender

Illinois Criminal Law Digest

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APPEAL

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People v. Dixon, 2015 IL App (1st) 133303 (No. 1-13-3303, 12/22/15)

1. Generally, the trial court's factual findings are accorded deference on review and reversed only if against the manifest weight of the evidence. This rule of deference is based on the trial court's superior position to weigh testimony, determine credibility, and resolve conflicts in the evidence. The court concluded that where the State presented no evidence concerning the weight or composition of a weapon and the trial court based the conclusion that the weapon was capable of being used as a bludgeon on its interpretation of a videotape, deference to the trial court's factual findings was not required.

2. After viewing the videotape, the Appellate Court concluded that it was unable to determine whether the firearm in question was of such weight and composition that it could be used as a bludgeon. Therefore, the evidence was insufficient to establish beyond a reasonable doubt that defendant or his co-defendant was armed with "a dangerous weapon that could be used as a bludgeon."

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

See also, **People v. Harris**, 2015 IL App (1st) 133892 (No. 1-13-3892, 12/22/15) (in the co-defendant's appeal, the conviction for armed robbery was reversed and the cause remanded for entry of a conviction for robbery because the evidence failed to show that the weapon was capable of being used as a bludgeon).

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

ARMED VIOLENCE

§§3-1, 3-3
People v. White, 2015 IL App (1st) 131111 (No. 1-13-1111, 12/16/15)

720 ILCS 5/33A-2 states that "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony [other than enumerated exceptions] defined by Illinois Law." Defendant was convicted of two counts of armed violence for the simultaneous possession, while armed with a handgun, of two controlled substances.

The court concluded that 720 ILCS 5/33A-2 is ambiguous concerning whether a person may be convicted of multiple counts of armed violence for simultaneously possessing two controlled substances while armed with a dangerous weapon. Because

the ambiguity must be interpreted in favor of the defendant, the court concluded that the statute does not authorize multiple armed violence convictions under these circumstances. One of defendant's armed violence convictions was reversed and the cause remanded for sentencing for possession of the same substance.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

BATTERY

§7-1(a)(3)

People v. Smith, 2015 IL App (4th) 131020 (No. 4-13-1020, 12/4/15)

1. Illinois Pattern Instructions, Criminal, Nos. 11.15 and 11.16, which define the offense of aggravated battery of a person over the age of 60, have not been updated to reflect 2006 amendments to the statute. Those amendments added, as an element of the offense, that the defendant knows the battered individual to be 60 or older. Before the 2006 amendments, knowledge of the age of the victim was not required.

Because IPI Criminal 4th Nos. 11.15 and 11.16 do not accurately convey the current state of the law, the court asked the Illinois Supreme Court Committee on Pattern Jury Instructions to consider updating the instructions.

2. The court also reversed the conviction for aggravated battery of a person over the age of 60 because the State failed to prove beyond a reasonable doubt that defendant knew the victim to be over the age of 60. The only evidence of the victim's age was his testimony that he was 63, but there was no evidence that he ever told defendant how old he was. Although defendant and the victim had a long-term friendship and were roommates for a short period of time, there was no evidence that the victim celebrated a birthday while the two were roommates. The court also noted that the State mistakenly believed that it was only required to show that the victim was over 60, and therefore failed to present evidence that defendant was aware of that fact.

Because there was nothing in the record to indicate that defendant was aware of the victim's age, the conviction for aggravated battery of a person over the age of 60 was reduced to battery.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

BURGLARY & RESIDENTIAL BURGLARY

§8-1(b)

People v. Larry, 2015 IL App (1st) 133664 (No. 1-13-3664, 12/1/15)

1. A person commits residential burglary when he knowingly and without authority enters the dwelling place of another with intent to commit therein a felony or theft. 720 ILCS 5/19-3(a). Dwelling means a house, apartment, mobile home, trailer, or other living quarters in which the owners or occupants actually reside or intend to reside within a reasonable period of time. 720 ILCS 5/2-6. The statute includes occupants as well as owners, so property interests do not come into play.

2. Defendant and the complaining witness, Shalonda Harris, were in a romantic relationship for three or four years. During that time, "excluding stints in jail," defendant stayed with Harris at her apartment. Defendant did not have keys, but he had access "whenever he wanted" through Harris. Harris testified that defendant lived in the apartment and left his clothing there.

On the morning of the incident, Harris was angry with defendant and would not let him into the apartment. She told him not to return and to send someone to get his clothes. Defendant broke into the apartment through a window. Once inside, defendant pulled Harris' hair and then left with her computer. The police arrested defendant nearby carrying the computer.

3. The Appellate Court reversed outright defendant's conviction for residential burglary, holding that the State failed to prove defendant entered "the dwelling place of another." Since the evidence showed that defendant actually resided at the dwelling place he entered, it could not by definition be the dwelling place of another.

The court rejected the State's argument that defendant did not actually reside in the apartment since he had no key and depended on Harris to grant him access. The record showed that defendant lived in the apartment for a number of years, kept his clothing there, and Harris often lent him her keys. The possession of a key is not "automatically indicative" of residency status. Some people, such as friends and neighbors, have keys to dwellings they do not inhabit. Others, such as family members and romantic partners, do not have keys to dwellings where they actually reside.

The court further noted that the State presented no evidence of who signed the lease or paid the rent. The court thus would not assume that defendant had not signed the lease or did not pay rent.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

COLLATERAL REMEDIES

§9-1(f)

People v. Jackson, 2015 IL App (3d) 130575 (No. 3-13-0575, 12/28/15)

1. Generally, the Post-Conviction Hearing Act contemplates that only one post-conviction petition will be filed. However, a successive petition may be filed where the trial court grants leave to do so. When leave to file a successive petition is granted, the petition is in effect advanced to the second stage of post-conviction proceedings.

At the second stage, the State has 30 days to answer or move to dismiss the petition. No further pleadings are permitted "except as the court may order on its own motion or on that of either party." 725 ILCS 5/122-5.

2. Post-conviction defense counsel may not argue against a client's interests by seeking dismissal of the post-conviction petition. If appointed counsel believes that a post-conviction petition is frivolous and patently without merit, he or she should file a motion to withdraw as counsel instead of asking that the petition be dismissed. If leave to withdraw is granted, the court may appoint new counsel or allow the defendant to proceed *pro se*. It is improper to dismiss a post-conviction petition merely because post-conviction counsel has been allowed to withdraw.

3. Here, post-conviction defense counsel erred by filing a motion to dismiss the successive post-conviction petition. In addition, the motion could not be deemed to have been filed by the State where the prosecutor did not file any pleading, but merely acquiesced in defense counsel's motion. Furthermore, because §5/122-5 and precedent require that a motion to dismiss must be in writing, the prosecutor's oral statements would have been insufficient to qualify as a motion to dismiss.

Because post-conviction counsel's motion to dismiss was improper, the trial court's order dismissing the petition was reversed. The cause was remanded with instructions to allow defendant to proceed *pro se*.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

§§9-1(j)(1), 9-1(j)(2)

People v. Shipp, 2015 IL App (2d) 131309 (No. 2-13-1309, 12/1/15)

Although post-conviction petitioners are not entitled to the effective assistance of counsel under the Sixth Amendment, they are statutorily entitled to a reasonable level of assistance by post-conviction counsel at second and third stage proceedings. In addition, Supreme Court Rule 651(c) provides that an attorney who represents a

petitioner at the second and third stages must file a certificate indicating that he or she has taken certain steps in the course of the representation.

The court stressed that the right of reasonable representation provided by Rule 651(c) attaches at the second stage of post-conviction proceedings, and does not apply to a petition that is dismissed at the first stage even if the petitioner was represented by counsel. Thus, the court rejected the petitioner's argument that where he was represented by retained counsel at the first stage, that attorney was required to provide reasonable assistance.

(Defendant was represented by Assistant Defender Chan Yoon, Chicago.)

§9-1(j)(2)

People v. Rodriguez, 2015 IL App (2d) 130994 (No. 2-13-0994, 12/23/15)

1. Under Illinois Supreme Court Rule 651(c), the record on appeal from a second-stage dismissal of a post-conviction petition "shall contain a showing," which may be made by a certificate of defendant's attorney, that counsel has consulted with defendant to ascertain his contentions of error, has examined the trial record, and has made any amendments to the *pro se* petition necessary "for an adequate presentation" of defendant's claims. Where counsel files no certificate, the record must show "clearly and affirmatively" that counsel substantially complied with the rule.

2. Defendant filed a *pro se* post-conviction petition alleging that trial counsel was ineffective for failing to investigate his fitness for trial or request a fitness hearing. The court advanced the petition to the second stage and appointed counsel.

Counsel filed an amended petition arguing in a confusing manner two issues that should have been distinct, but counsel conflated together: (1) appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to request a fitness examination of defendant; and (2) a *bona fide* doubt existed as to defendant's fitness and due process bars the prosecution of an unfit defendant. The State filed a motion to dismiss arguing that there was no evidence in the trial record that defendant was unfit.

Immediately after the trial court granted the State's motion, counsel moved for the appointment of an expert witness to conduct a retrospective fitness examination of defendant. The trial court allowed counsel to file the motion, but no more proceedings were held on the motion before defendant filed a notice of appeal. Counsel did not file a 651(c) certificate.

3. On appeal, defendant argued that post-conviction counsel's performance was unreasonable under Rule 651(c) because he failed to provide sufficient support for the

second fitness claim: that he had been unfit to stand trial. Specifically, he failed to produce any evidence that defendant had actually been unfit. The State argued that counsel had no obligation to properly present the issue of whether defendant had been tried while unfit since defendant did not raise that specific claim in his *pro se* petition.

The Appellate Court held that the record showed that counsel was aware of the second fitness claim and specifically asked for the appointment of an expert to perform a retrospective fitness evaluation to provide support for the claim. But the issue was never fully explored, let alone properly raised. Because counsel failed to do so, he did not amend the petition to adequately present defendant's contentions, and thus failed to provide a reasonable level of assistance under Rule 651(c).

The court remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

§9-2(a)

People v. Carter, 2015 IL 117709 (No. 117709, 12/3/15)

1. Under Supreme Court Rules 105 and 106, a §2-1401 petition must be filed by certified or registered mail. Once notice of the filing has been properly served, the responding party has 30 days to file an answer or otherwise appear. These notice requirements are designed to notify a party of pending litigation in order to secure his appearance and to prevent a litigant from obtaining new or additional relief without first giving the opposing party an opportunity to defend.

In **People v. Vincent**, 226 Ill. 2d 1, 871 N.E.2d 17 (2007), where neither proper service nor actual notice was at issue, the court held that the *sua sponte* dismissal of §2-1401 petitions are proper where the State does not answer or otherwise plead within the 30-day period. By contrast, in **People v. Laugharn**, 233 Ill. 2d 318, 909 N.E.2d 802 (2009), the court concluded that where only seven days had passed since the petition was filed, the trial court erred by entering a dismissal order *sua sponte* because the State did not have the benefit of the 30-day period for responding.

2. Here, the court found that the record failed to show that defendant failed to properly serve his §2-1401 petition on the State. Defendant attached a certificate of service to the §2-1401 petition, alleging that he had placed the petition in the prison mail system at Menard Correctional Center addressed to the clerk of the court and the state's attorney's office. The petition was stamped "Received" by the circuit clerk on May 15, 2012, and was dismissed by the trial court on July 10 of the same year. The Appellate Court reversed the dismissal order, finding that because there was no indication that defendant had properly served the State, dismissal was not authorized.

The Supreme Court acknowledged that a return-receipt for certified mail is sufficient proof of service by certified mail, but declined to find that the absence of such a receipt affirmatively establishes that service was by regular mail. Thus, where the proof of service stated only that defendant had placed the petition in the institutional mail to be transmitted by the United States Postal Service, there was no basis to infer that service was by regular mail and therefore did not comply with Rules 105 and 106.

Because the record did not establish that defendant failed to serve the petition on the State by certified or registered mail, the trial court had authority to dismiss the petition once 30 days had passed after the filing date.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

§9-2(a)

People v. Thompson, 2015 IL 118151 (No. 118151, 12/3/15)

A defendant seeking relief under section 2-1401 must ordinarily file the petition within two years of the judgment being challenged. 735 ILCS 5/2-1401(a), (c). The two-year limitations period, however, does not apply when the petition challenges a void judgment.

Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry**, 2015 IL 116916.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant's claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

CONFESSIONS

§10-2

People v. Hughes, 2015 IL 117242 (No. 117242, 12/17/15)

Defendant, who was charged with first degree murder, moved to suppress statements which he made during police interrogations after he was brought from Michigan to Chicago. The motion alleged several grounds, including that: (1) defendant was not properly advised of his **Miranda** rights, (2) defendant was incapable of appreciating and understanding the full meaning of **Miranda** rights, (3) the statements were obtained during interrogations which continued after defendant exercised his right to silence and/or elected to consult with an attorney, (4) the statements were obtained through psychological, physical and mental coercion, and (5) the statements were involuntary.

At the hearing on the motion to suppress, trial counsel acknowledged the breadth of the motion to suppress and stated that the defense would proceed on two theories: (1) that defendant's hands had been handcuffed in a very uncomfortable position for the 90-minute drive to Chicago, and (2) that detectives questioned defendant on that drive without informing him of his **Miranda** rights and without making a video recording. Trial counsel stated, "I just want to give notice to counsel those are the grounds we will be proceeding on."

The trial court denied the motion to suppress, finding that the statements were not coerced and that the detectives testified credibly that they had given defendant **Miranda** warnings. Defendant's post-trial motion stated that the trial court erred by denying the motion to suppress, without any amplification.

On appeal, defendant raised several issues concerning his statements, including that his statements were involuntary because he was 19 years old, had only a ninth grade education, had not done well in school, had little to no sleep at the time of the statement, was suffering from severe emotional distress due to the death of his grandfather, and was the victim of deceptive and coercive police conduct. Defendant also claimed that he was susceptible to suggestion due to substance abuse.

The Supreme Court held that the issues were waived because defendant had not presented them in the trial court.

1. Although the terms "forfeiture" and "waiver" have been used interchangeably, "waiver" is the voluntary relinquishment of a known right while "forfeiture" is the failure to comply with procedural requirements. Here, the claims which defendant raised on appeal, while not factually "hostile" to the claims raised in the trial court, were "almost wholly distinct" from the issues litigated at trial. Under these circumstances, the issues raised on appeal were not preserved.

The Supreme Court stressed that due to the differences between the issues raised in the trial court and on appeal, the trial court did not have an opportunity to consider and rule on the bulk of the challenges which defendant made on appeal. Likewise, the State did not have an opportunity to present evidence or argument concerning the challenges that were raised on appeal. Although a defendant need not present identical arguments in the trial court and on appeal, "almost entirely distinct" contentions are improper.

2. In a concurring opinion, Justices Burke, Thomas, and Kilbride noted that the majority failed to address defendant's plain error argument. However, the concurrence concluded that plain error did not occur.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

EVIDENCE

§19-10(b)

People v. Burnett, 2015 IL App (1st) 133610 (No. 1-13-3610, 12/18/15)

725 ILCS 5/115-10.2a provides that in domestic violence prosecutions, a statement which is not specifically covered by a hearsay exception but which has equivalent circumstantial guarantees of trustworthiness may be admitted if the declarant is unavailable and the statement is offered as evidence of a material fact, is more probative on that point than any other evidence which can be procured by reasonable efforts, and the purposes of the domestic violence statute and the interests of justice will be served. "Unavailability" is defined for purposes of §115-10.2a as refusing to testify concerning

the subject matter of the statement despite a court order to do so or testifying to a lack of memory on the subject matter of the prior statement. Section 115-10.2a was enacted before the U.S. Supreme Court decided **Crawford v. Washington**, 541 US 36 (2004), which holds that the admission of hearsay satisfies constitutional concerns only if the witness is available for cross-examination or the witness is unavailable and the defendant had a prior opportunity to cross-examine.

Defendant was convicted in a bench trial of violating an order of protection that had been obtained by his girlfriend. At trial, the girlfriend testified that she did not remember the events of the day in question. Despite being shown a typed statement she had made to police, she continued to state that she had no memory of the incident. Under the authority of §115-10a, the trial court admitted the witness's statement to police.

In an apparent case of first impression, the Appellate Court held that the witness was "unavailable" for purposes of §115-10a but "available" for purposes of the **Crawford** rule and the Sixth Amendment. First, the witness was deemed "unavailable" under §115–10.2a because she "persist[ed] in refusing to testify" or "testifie[d] to a lack of memory" concerning the subject matter of the prior statement. 725 ILCS 5/115-10a(c)(2),(3). Thus, the statement was admissible under §115-10.2a.

Second, **Crawford** states that a witness is "available" for Sixth Amendment purposes if she is "present at trial to defend or explain" the out-of-court statement. Because the witness answered preliminary questions and a number of questions about the offense which was described in the prior statement, the court concluded that she was "available" for purposes of **Crawford**. Thus, admission of the statement did not violate **Crawford**.

(Defendant was represented by Assistant Defender Samuel Hayman, Chicago.)

FITNESS TO STAND TRIAL

Ch. 21

People v. Shaw, 2015 IL App (4th) 140106 (No. 4-14-0106, 12/21/15)

1. When there is a question about a defendant's fitness to stand trial, the court may order an expert to conduct a fitness examination and may consider the expert's report at a fitness hearing. But the record must show an affirmative exercise of judicial discretion regarding the fitness determination, and a court's fitness determination may not be based solely upon a stipulation to an expert's conclusions or findings. Where the parties stipulate to an expert's anticipated testimony, rather than the expert's conclusions, the court may consider this stipulation in making its decision. But the distinction between proper and improper stipulations "is a fine one."

2. Prior to trial, defense counsel filed a motion for a fitness hearing. The trial court ordered a fitness examination and appointed a mental health expert to examine defendant. The expert filed a report finding defendant fit to stand trial. On the day defendant's case was set for trial, the parties addressed the fitness issue. The court confirmed that both parties received the expert's report and both stipulated that the expert would testify "as set forth in his report."

The court then stated: "We will show based upon the evidence presented, the court finds the defendant fit to plead and/or stand trial."

3. On appeal, defendant argued that the trial court erred by simply accepting the parties' stipulations to the expert's report rather than conducting an independent inquiry into whether he was fit to stand trial. The Appellate Court disagreed, holding that the trial court properly relied on stipulated evidence to find defendant fit. The stipulations were based on the testimony the expert would provide if called to testify, not solely his ultimate conclusion that defendant was fit. The trial court was free to rely on the stipulations when deciding whether defendant was fit.

4. In a special concurrence, Justice Steigmann suggested that the Illinois Supreme Court reconsider its decision in **People v. Lewis**, 103 Ill. 2d 111 (1984), which held that the parties may stipulate to what an expert would testify to, but a trial court may not accept a stipulation regarding the fact of defendant's fitness. The special concurrence found that the distinction drawn in **Lewis** is a "distinction without a difference, as this very case shows."

(Defendant was represented by Assistant Defender Amanda Kimmel, Springfield.)

HOMICIDE

§26-7(b)

People v. Cacini, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)

Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave IPI Criminal 4th No. 24-25.06, which provides the general definition of self-defense. However, the trial judge failed to also give IPI Criminal 4th No. 24-25.06A, which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to IPI Criminal 4th No. 24-25.06 instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

1. Once the defense properly raises the affirmative defense of self-defense, the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. The jury must be instructed as to the affirmative defense and the State's corresponding burden of proof. IPI Criminal 4th Nos. 24-25.06 and 24-25.06A fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

2. Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 651(a).

Under the plain-error doctrine, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

3. Although defense counsel failed to tender IPI Criminal 4th No. 24-25.06A, failed to timely object to the absence of the instruction, and failed to include the issue in his post-trial motion, the Appellate Court concluded that the trial judge's failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party's closing argument clarified the burden of proof and the State's closing argument could easily have been misinterpreted.

Defendant's convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

INDICTMENTS, INFORMATIONS, COMPLAINTS

§29-3

People v. Lopez, 2015 IL App (4th) 150217 (No. 4-15-0217, 4-15-0218), 12/4/15)

Absent statutory authorization or a clear denial of due process which prejudices the defendant, a trial court has no authority to dismiss criminal charges before trial either on the court's own motion or on the motion of the defense. Statutory authority to dismiss a charge before trial exists only for the grounds set forth in 725 ILCS 5/114-1.

Here, the trial court erred by dismissing traffic charges "for failure to prosecute" after the State's Attorney failed to appear at a pretrial conference. The trial court waited 15 minutes, and then dismissed the charges when no prosecutor appeared.

The Appellate Court stated that although the trial judge lacked authority to dismiss the charge for failure to prosecute, it did have the ability to control its calendar by using its contempt powers to require the prosecutor to appear. The trial court's dismissal order was vacated and the cause remanded for further proceedings.

§§29-4(a), 29-4(b)

People v. Espinoza, 2015 IL 118218 (No. 118218, 12/3/15)

1. The Supreme Court reiterated precedent that the charging instrument must identify the victim of the offense. Where a charging instrument is challenged before trial, strict compliance with pleading requirements is necessary. In addition, where the charge is challenged before trial the defendant is not required to show prejudice in order to obtain dismissal of the charge.

2. In the course of rejecting several arguments urging modification of the requirement that charging instruments must identify the victim, the court noted that the current rule has been reflected in Illinois case law for more than 170 years. In addition, the General Assembly accepted the rule when it enacted the Code of Criminal Procedure in 1964 and when amending the Code since that time.

The court stressed that a criminal defendant has a fundamental right to be informed of the nature of the accusations against him, and that due process requires that the charging instrument notify the defendant of the offense with enough specificity to enable a proper defense. In addition, because the purpose of alleging the name of the victim is to enable the accused to plead either a formal acquittal or a conviction as a bar to a second prosecution for the same offense, the requirement that the victim be named is founded on protection of the right against double jeopardy.

The court rejected the argument that the public interest in protecting minors' privacy warrants an exception to the requirement that the charge name the victim. The court noted that in this case the State sought to eliminate the need to provide any identifying information concerning victims who were minors. However, 725 ILCS 5/111-3(a-5) requires that the victims of sexual offenses be identified by name, initials, or description. The court stated, "The State has failed to persuade this court that minor victims of nonsexual offenses should be provided greater protections than those provided to victims of illegal sexual acts."

3. The first defendant was charged with domestic battery for making physical contact of an insulting or provoking nature "with a minor, a family or household member, in that said defendant struck the minor about the face." At pretrial hearings, the State indicated that the victim was defendant's son.

The second defendant was charged with endangering the life or health of a child in that she "left the minor child alone . . . without adult supervision." The police report named five different minors under the age of 18, three of whom were allegedly defendant's children. In response to defendant's motion for a bill of particulars, the State filed a sealed bill of particulars naming the victim.

The court concluded that because charging documents describing the victims only as "minors" were insufficient to adequately identify the victims, the trial court's order dismissing the charging instruments should be affirmed.

(Defendant was represented by Assistant Defender Lucas Walker, Elgin.)

JURY

§32-8(a)

People v. Smith, 2015 IL App (4th) 131020 (No. 4-13-1020, 12/4/15)

Illinois Pattern Instructions, Criminal, Nos. 11.15 and 11.16, which define the offense of aggravated battery of a person over the age of 60, have not been updated to reflect 2006 amendments to the statute. Those amendments added, as an element of the offense, that the defendant knows the battered individual to be 60 or older. Before the 2006 amendments, knowledge of the age of the victim was not required.

Because IPI Criminal 4th Nos. 11.15 and 11.16 do not accurately convey the current state of the law, the court asked the Illinois Supreme Court Committee on Pattern Jury Instructions to consider updating the instructions.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

§32-8(b), 32-8(e)

People v. Cacini, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)

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As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

1. Once the defense properly raises the affirmative defense of self-defense, the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. The jury must be instructed as to the affirmative defense and the State's corresponding burden of proof. IPI Criminal 4th Nos. 24-25.06 and 24-25.06A fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

2. Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 651(a).

Under the plain-error doctrine, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

3. Although defense counsel failed to tender IPI Criminal 4th No. 24-25.06A, failed to timely object to the absence of the instruction, and failed to include the issue in his post-trial motion, the Appellate Court concluded that the trial judge's failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party's closing argument clarified

the burden of proof and the State's closing argument could easily have been misinterpreted.

Defendant's convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

§32-8(i)

People v. Johnson, 2015 IL App (1st) 141216 (No. 1-14-1216, 12/23/15)

1. Whether a crime is a lesser-included offense is determined by the "charging instrument" test, which permits conviction of an uncharged offense if: (1) the instrument charging the greater offense contains the broad foundation or main outline of the lesser offense, and (2) the evidence rationally supports a conviction on the lesser offense. The latter question is to be considered only after it is determined that the uncharged crime is a lesser-included offense.

2. A charge may set forth the broad foundation or main outline of the lesser offense even if it does not contain every element of the lesser offense, so long as the missing element can be reasonably inferred. Here, defendant was charged with armed robbery for knowingly taking currency from the person or presence of the complainant by the use of force or by threatening the imminent use of force while being armed with a firearm. The complainant testified that defendant pointed a firearm at him, but no weapon was recovered and the State did not produce a firearm at trial.

The trial court found that the evidence was insufficient to establish that the item which defendant displayed was a firearm. However, the judge entered a conviction for aggravated robbery. Aggravated robbery occurs when a person commits robbery while indicating verbally or by conduct that he or she is armed with a firearm, even if it is later determined that there was no firearm.

The Appellate Court concluded that the armed robbery charge alleged the broad outline of aggravated robbery. The court found that the allegation that defendant took property "by the use of force or by threatening the imminent use of force" while armed with a firearm provided a basis to reasonably infer that the defendant indicated either verbally or by his actions that he was armed. Thus, aggravated robbery was a lesser included offense of armed robbery.

3. The court concluded, however, that the evidence was insufficient to justify a conviction for aggravated robbery. The only evidence showing that defendant indicated that he was armed was the complainant's testimony that defendant displayed an item which the trial court found not to be a firearm. "The trial court did not find the victim's testimony about a firearm credible enough to conclude that defendant frightened him with a firearm, and thus the evidence was also insufficient for aggravated robbery."

4. The court reached the issue as second-stage plain error, finding that the entry of a conviction on a crime which is not a lesser-included offense violates the fundamental right to notice of the charges and affects the fairness of the trial and the integrity of the judicial process.

Defendant's conviction for aggravated robbery was reduced to simple robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

JUVENILE

§33-6(a)

People v. Wilson, 2015 IL App (4th) 130512 (No. 4-13-0512, 12/3/15)

1. Under **Graham v. Florida**, 560 U.S. 48 (2010), the "cruel and unusual punishment" clause of the Eighth Amendment is violated by a mandatory life sentence without the possibility of parole for a juvenile offender who did not commit a homicide. Here, the court concluded that **Graham** was violated by imposition of natural life sentences without the possibility of parole on three counts of predatory criminal sexual assault of a child which were committed about six months before defendant's 18th birthday. The natural life sentences were imposed under 720 ILCS 5/12-14.1(b)(1.2), which mandates sentences of life without parole for convictions of predatory criminal sexual assault of a child which were committed against two or more persons, "regardless of whether the offenses occurred as the result of the same act or several related or unrelated acts."

2. The court rejected the State's request to affirm two natural life sentences for counts of predatory criminal sexual assault of a child which occurred after defendant turned 18. First, because both counts were committed against a single victim, they did not trigger natural life sentencing on their own.

Second, the court rejected the argument that the three counts on which the natural life sentences were vacated because the offenses occurred when defendant was a minor could be used to impose natural life sentences on the two counts which were committed after defendant turned 18. "It is contrary to the analysis in **Graham** to permit the conduct for which a defendant could not receive a life sentence to trigger a life sentence for a second offense, committed after defendant's 18th birthday."

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

§§33-6(f)(1), 33-7(b), 33-9

In re Michael D., 2015 IL 119178 (Docket No. 119178, 12/17/15)

1. The Illinois Constitution confers jurisdiction on the Appellate Court to review final judgments, and authorizes the Supreme Court to provide by rule for appeals from other than final judgements. Supreme Court Rule 660(a) provides that final judgements in delinquency proceedings may be appealed under the rules for criminal appeals.

2. 705 ILCS 405/5-615(1) provides that for certain offenses, juvenile courts may order continuances under supervision. Until 2014, a continuance under supervision could be ordered only where the court had not made a finding of delinquency, the minor admitted or stipulated to facts supporting the petition, and there was no objection from the minor, the minor's attorney, the State's Attorney, or the minor's parent or legal custodian. Effective January 1, 2014, 705 ILCS 405/5-615(1)(b) authorizes juvenile courts to enter continuances under supervision after a finding of delinquency has been made if the court finds that the minor is not likely to commit further crimes, the minor and the public would be best served if the minor were not to receive a criminal record, and in the interests of justice an order of continuance under supervision is more appropriate than a sentence.

3. Case law holds that a continuance under supervision that is ordered before a delinquency finding is made may not be appealed. The court concluded that the same rule applies to a continuance under supervision ordered after a delinquency finding has been made.

The court noted that in order to be appealable, continuance under supervision orders must constitute final judgments or be the subject of a Supreme Court Rule. A final judgment is one which finally determines the litigation on the merits so that, if it is affirmed, all that remains is to execute the judgement. The court stated that it is difficult to see how an order that is referred to as a "continuance" could be a final judgment. In addition, continuance under supervision orders are entered before the adjudicatory and dispositional phases of the proceeding have occurred. Thus, orders of supervision are clearly not final orders.

The court also found that no Supreme Court Rule allows the appeal of a continuance under supervision. Adult orders of supervision are appealable under Rule 604(b), but that rule by its terms does not apply to juveniles. The only rule which grants any right to an interlocutory appeal in juvenile cases is Rule 662, which applies only to the proceedings that are specifically listed and not to continuances under supervision.

4. The court also stated that whether Supreme Court Rules should be amended to allow appeals of orders granting continuances under supervision is an issue which should be considered by the Supreme Court Rules Committee.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

NARCOTICS

§35-3(c)(1)

People v. Moore, 2015 IL App (1st) 140051 (No. 1-14-0051, 12/16/15)

Defendant was convicted of unlawful possession of ammunition by a felon and possession of a controlled substance after police officers executed a search warrant for the home of defendant's great-grandmother. Defendant was observed jumping out a window as police approached the house. Officers recovered ammunition from a desk in the living room and from the basement rafters, and also found what they suspected to be cocaine in the rafters. In addition, in one of three bedrooms officers discovered mens' clothing and a letter that was addressed to the defendant at the house.

Defendant's great-grandmother testified that defendant did not live at the house, but that he had been at the house on the day of the search and had received mail there. In addition, defendant's sister and a friend testified that he did not live at the house.

The Appellate Court reversed the convictions, finding that the evidence failed to prove that defendant had constructive possession of the contraband.

1. Possession of contraband may be actual or constructive. Where the defendant was not observed in the presence of the recovered contraband, the State was required to prove constructive possession. To establish constructive possession, the State must show that the defendant had knowledge of the contraband and exercised immediate and exclusive control over the area where the contraband was found. Constructive possession can be proven by evidence that the defendant once had physical control over the contraband, intended to exercise control again, and did not abandon the items, and that no other person obtained possession.

Constructive possession is typically proved through circumstantial evidence such as acts, statements, or conduct which support an inference that defendant knew the prohibited items were present. In addition to knowledge, the State must prove that the defendant exercised immediate and exclusive control over the area where the contraband was found.

2. The court concluded that even taken most favorably to the State, the evidence did not establish that defendant had knowledge of the contraband. First, although officers found mail addressed to defendant and men's clothing in the bedroom, the contraband was not found in the bedroom. In addition, the mail had been postmarked more than six months earlier and the clothing was not specifically linked to defendant.

The court acknowledged that defendant fled as police approached, but noted that flight is only one factor and must be considered with all of the other evidence.

3. Even had the State proven that defendant knew of the contraband, there would have been insufficient evidence that he had immediate and exclusive control over the

area where the contraband was found. Although residency at property where contraband is found may show control of the premises, there was insufficient evidence here to show that defendant lived on the premises. Not only was the letter found in the bedroom six months old, but the clothing was not shown to belong to defendant. In addition, defendant presented three witnesses who testified that he did not live at the house. Under these circumstances, defendant did not have exclusive control of the area where the contraband was found.

(Defendant was represented by Assistant Defender Robert Melching, Chicago.)

REASONABLE DOUBT

§42-2
In re Nasie M., 2015 IL App (1st) 151678 (No. 1-15-1678, 12/1/15)

1. When a defendant challenges the sufficiency of the evidence, the reviewing court must decide whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Generally, the trier of fact is in the best position to judge credibility and it is not the function of the reviewing court to retry the case. A finding of guilt will only be reversed where the proof was so improbable, implausible, or unsatisfactory that reasonable doubt exists.

2. Following a bench trial, defendant was convicted of several gun offenses, all of which required proof that he possessed a gun. The State's evidence showed that the police spoke with defendant at a vacant lot where he had been shot in the foot. Defendant was taken to the hospital and the police went to his girlfriend's apartment, where they found a gun under a mattress. The gun contained a live, unfired cartridge.

An officer interviewed defendant at the hospital where he was being treated and was on pain medication. Defendant initially told the officer that he had been shot by two assailants who were behind him. The officer observed that the wound was to the top of defendant's foot and questioned defendant's version of events. He also told defendant that a gun had been recovered from his girlfriend's house. Defendant then admitted the gun was his. He told the officer that he had been carrying the gun, accidentally shot himself in the foot and then took the gun back to his girlfriend's house.

Defendant, by contrast, testified that two men fired several shots at him as he attempted to flee from them. He had two gunshots wounds to the bottom of his foot and one wound to the top. The hospital gave him medication for his extreme pain, which put him in and out of sleep. He did not recall speaking to any officers at the hospital and denied telling the police that he shot himself in the foot.

In finding defendant guilty, the trial court acknowledged that the police could have done a more thorough investigation, including testing defendant for gunshot residue and test-firing the gun. But the court found that the officer who questioned defendant was believable and defendant was not, and that defendant "admits shooting himself."

3. The Appellate Court reversed outright defendant's convictions for the weapons offenses holding that the State failed to prove that defendant possessed a firearm. The court observed that the State had provided no reason why defendant's admission that he possessed the gun should be presumed to be more credible than his trial testimony denying that possession. Moreover, the version of events in the admission were "not necessarily corroborated" by the other evidence. Under that version, defendant would have had to shoot himself in the foot, run or hop to his girlfriend's apartment, get rid of the gun, and then return to the scene of the shooting where he spoke to the police, all within a short span of time.

The court gave little weight to the significance of the officer's observation of a gunshot wound to the top of defendant's foot since the officer was not an expert in gunshot wounds. The court also noted the absence of eyewitness testimony, forensic evidence and medical evidence. The court thus concluded that the State failed to prove defendant's guilt beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

ROBBERY

§§43-1, 43-3

People v. Johnson, 2015 IL App (1st) 141216 (No. 1-14-1216, 12/23/15)

1. Whether a crime is a lesser-included offense is determined by the "charging instrument" test, which permits conviction of an uncharged offense if: (1) the instrument charging the greater offense contains the broad foundation or main outline of the lesser offense, and (2) the evidence rationally supports a conviction on the lesser offense. The latter question is to be considered only after it is determined that the uncharged crime is a lesser-included offense.

2. A charge may set forth the broad foundation or main outline of the lesser offense even if it does not contain every element of the lesser offense, so long as the missing element can be reasonably inferred. Here, defendant was charged with armed robbery for knowingly taking currency from the person or presence of the complainant by the use of force or by threatening the imminent use of force while being armed with a firearm. The complainant testified that defendant pointed a firearm at him, but no weapon was recovered and the State did not produce a firearm at trial.

The trial court found that the evidence was insufficient to establish that the item which defendant displayed was a firearm. However, the judge entered a conviction for aggravated robbery. Aggravated robbery occurs when a person commits robbery while indicating verbally or by conduct that he or she is armed with a firearm, even if it is later determined that there was no firearm.

The Appellate Court concluded that the armed robbery charge alleged the broad outline of aggravated robbery. The court found that the allegation that defendant took property "by the use of force or by threatening the imminent use of force" while armed with a firearm provided a basis to reasonably infer that the defendant indicated either verbally or by his actions that he was armed. Thus, aggravated robbery was a lesser included offense of armed robbery.

3. The court concluded, however, that the evidence was insufficient to justify a conviction for aggravated robbery. The only evidence showing that defendant indicated that he was armed was the complainant's testimony that defendant displayed an item which the trial court found not to be a firearm. "The trial court did not find the victim's testimony about a firearm credible enough to conclude that defendant frightened him with a firearm, and thus the evidence was also insufficient for aggravated robbery."

4. The court reached the issue as second-stage plain error, finding that the entry of a conviction on a crime which is not a lesser-included offense violates the fundamental right to notice of the charges and affects the fairness of the trial and the integrity of the judicial process.

Defendant's conviction for aggravated robbery was reduced to simple robbery and the cause was remanded for re-sentencing.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

§43-2

People v. Dixon, 2015 IL App (1st) 133303 (No. 1-13-3303, 12/22/15)

Defendant was convicted of the armed robbery of a store owner while defendant or the co-defendant carried "a dangerous weapon that could be used as a bludgeon." The trial court found that a surveillance videotape of the incident was sufficient to establish that a handgun carried by the defendants was capable of being used as a bludgeon.

A police officer testified that at first the store owner was not certain whether the defendants were armed during the offense, but after watching the surveillance video the owner concluded that defendants were holding a firearm. Although no weapon was introduced at trial, defendant told officers that he and his co-defendant had a BB gun

which broke when they dropped it after leaving the store, and that they had thrown the item away.

The Appellate Court concluded that it was not required to defer to the trial court's factual findings, and that the evidence was insufficient to satisfy the reasonable doubt standard.

1. To sustain a conviction for armed robbery, the trial court was required to find that defendant was armed with a dangerous weapon other than a firearm. Dangerous objects are divided into three categories, including objects that are dangerous *per se*, objects that are not dangerous *per se* but which were actually used in a dangerous manner, and objects that are neither dangerous *per se* nor used in a dangerous manner but which could be used in a dangerous manner. Here, the State argued that due to the weapon's size and weight it could have been used as a club or bludgeon.

2. Normally, the trial court's factual findings are accorded deference on review and reversed only if against the manifest weight of the evidence. This rule of deference is based on the trial court's superior position to weigh testimony, determine credibility, and resolve conflicts in the evidence. The court concluded that where the State presented no evidence concerning the weight or composition of the weapon and the trial court based the conclusion that the weapon was capable of being used as a bludgeon on its interpretation of a videotape, deference to the trial court's factual findings was not required.

3. Where the State failed to introduce the weapon or any evidence that it was loaded or of such weight and composition that it could have been used as a bludgeon, defendant gave unrebutted testimony that the object was a BB gun that broke when it was dropped, and after viewing the videotape the Appellate Court could not determine whether the firearm could be used as a bludgeon, there was insufficient evidence to establish that the gun was capable of being used as a bludgeon. The conviction for armed robbery was reversed and the cause remanded for entry of a conviction for robbery.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

See also, **People v. Harris**, 2015 IL App (1st) 133892 (No. 1-13-3892, 12/22/15) (in the co-defendant's appeal, the conviction for armed robbery was reversed and the cause remanded for entry of a conviction for robbery because the evidence failed to show that the weapon was capable of being used as a bludgeon).

SEARCH AND SEIZURE

§§44-1(a), 44-1(c)(3), 44-11(a), 44-13

People v. Butler, 2015 IL App (1st) 131870 (No. 1-13-1870, 12/24/15)

1. Under **Riley v. California**, 573 U.S. ___, 134 S.Ct. 2473, 189 L.Ed. 430 (2014), officers must secure a warrant before searching a cellular phone. The *Riley* court balanced the privacy interests of cell phone users against the need for such searches to promote legitimate government interests such as preventing the destruction of evidence and harm to officers, and concluded that due to the vast quantities of personal information stored on modern phones the search of a phone exposes far more private information than even an exhaustive search of a house.

2. The **Riley** court recognized that despite the general requirement of a warrant, a warrantless search of the contents of a cell phone may be justified by some exception to the warrant requirement other than for searches conducted incident to a lawful arrest. However, the court rejected the State's argument that the warrantless search of defendant's phone here was proper under the community caretaking exception.

Community caretaking constitutes an exception to the warrant requirement where police are performing a task that is unrelated to the investigation of crime, such as helping children find their parents, mediating noise disputes, responding to calls about missing persons or sick neighbors, or helping intoxicated persons find their way home. The community caretaking exception applies when two factors are met. First, when viewed objectively, the officer's actions must constitute the performance of some function other than investigation of a crime. Second, the search or seizure must be reasonable because it was undertaken to protect the safety of the general public. Reasonableness is measured objectively by examining the totality of the circumstances.

Where defendant was present in a hospital emergency room for treatment of a gunshot wound, the community caretaking exception did not justify a search of his cell phone for the purpose of calling someone in defendant's family to inform them that he was at the hospital. Because defendant was alert and could have been asked whether he wanted anyone to be contacted, the search could have been accomplished by better and less intrusive means. In addition, the officer could have inquired of hospital staff whether defendant's family had been called. Choosing to "aimlessly scroll . . . through a list of unknown names" on defendant's phone was not a reasonable way to notify defendant's family that he was in the hospital.

In rejecting the State's argument that the balance between defendant's privacy interest and society's interest in the welfare of its citizens favors allowing an officer to search a cell phone to find contact information, the court noted the discussion in *Riley* that cell phones contain immense amounts of digital information and implicate privacy concerns beyond those involved in the search of objects such as purses or wallets.

3. The court rejected the State's argument that defendant gave implied consent for his cell phone to be searched when he asked a nurse to call his sister. The State argued that it was reasonable to believe that the officer overheard this request and decided to carry it out by using defendant's cell phone. The State contended that because defendant asked that his sister be contacted, use of the cell phone was inevitable and it did not matter who acted on the request.

The court noted that not only was evidence lacking to show that the officer heard defendant's request to the nurse, but that request was made to the nurse and not the officer. Consent is determined by whether a reasonable person would have understood an individual's words or conduct as granting consent. No reasonable person would have understood defendant's request that a nurse call his sister as granting consent for other persons to search his cell phone. Furthermore, defendant's request did not constitute a relinquishment of his privacy expectations in his cell phone where there was no evidence that defendant asked the nurse to use his cell phone to call his sister.

4. The court rejected the argument that independent probable cause and exigent circumstances justified seizure of the phone until a warrant could be secured. The officer did not merely hold the phone until a warrant was obtained, but immediately searched it. In addition, there was no need to make an immediate search where all of defendant's clothing and personal effects had been removed by the hospital staff, there was no reason to believe that defendant was armed, and there was no likelihood that defendant would have left the hospital before a search warrant could be obtained. Furthermore, even if it is assumed that the officer had probable cause to believe that defendant had been involved in a shooting, there was no reason to believe that the phone contained any relevant information.

5. Finally, the court rejected the State's argument that the search of the phone was justified by the inevitable discovery exception. The inevitable discovery exception applies where the prosecution can show that evidence would necessarily have been discovered in the absence of any police error or misconduct.

Although a search warrant was eventually obtained to gain access to the cell phone, that warrant was based on a text message which the officer saw during the improper search. Had the officer not searched the phone, the police would not have had such information on which to request a warrant. Because evidence obtained during an illegal search cannot justify issuance of a search warrant, the text message would not inevitably have been discovered.

Defendant's conviction for second degree murder was reversed. The cause was remanded for an attenuation hearing to determine whether defendant's statement to police was a fruit of the unlawful search of the cell phone.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

§44-1(a)

People v. Ealy, 2015 IL App (2d) 131106 (No. 2-13-1106, 12/29/15)

Compelled DNA extraction constitutes a "search" under both the Fourth Amendment and the Illinois Constitution, and therefore requires a warrant unless the defendant consents. At a jury trial for first-degree murder, the trial judge erred by admitting evidence that the defendant refused to submit to DNA testing.

The court stressed that the evidence allowed the jury to infer consciousness of guilt from the exercise of a constitutional right and that any probative value of the evidence was substantially outweighed by its prejudicial effect. In addition, the prejudice was exacerbated by the admission of evidence that 30 other persons had been interviewed by police and had consented to DNA testing.

The court found that it was irrelevant that defendant was not in custody at the time he refused the request for a DNA sample and thus was not reacting to **Miranda** warnings indicating that he was not required to cooperate with officers. The inadmissibility of a refusal to consent to DNA testing is based on the constitutional right to refuse to consent, and does not depend on whether the particular defendant was advised of that right.

The court concluded, however, that under the circumstances of this case the error was harmless beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

§§44-6(a), 44-10(a), 44-10(b)

People v. Jones, 2015 IL App (1st) 142997 (No. 1-14-2997, 12/8/15)

After defendant was stopped for making a right turn without stopping at the red light, a license check disclosed that there was an "active investigative alert" involving a homicide. The officer had no further information concerning the alert, but with defendant's permission conducted a quick protective pat down which did not reveal any contraband.

The officer informed defendant that he would be detained while more information was sought concerning the alert. Defendant was placed in the backseat of the squad car with the car doors closed, but was not handcuffed. The officer testified that he had experience with narcotics arrests and had seen narcotics packaging, but that he did not see anything suspicious in defendant's car.

While the officer was awaiting information to determine whether the alert "was for probable cause to arrest," backup officers arrived and "secured" defendant's car.

According to the State, "securing a car means looking for guns by walking around the car." The backup officer testified that as he was walking around the car, he looked through the rear passenger-side window and saw a square black object wrapped in cellophane and black tape.

The officer entered the car and retrieved the object, which he believed to be cocaine. The object was recovered before any additional information was received concerning the investigative alert, about five to ten minutes after defendant had been placed in the squad car.

Defendant was arrested for possession of cocaine. A search of his person revealed a large bundle of currency in his right front pocket.

The trial court granted defendant's motion to suppress, finding that defendant was arrested without probable cause because he was taken into custody based on the alert. The Appellate Court affirmed the suppression order.

1. Probable cause exists where the facts known at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the individual has committed or is about to commit a crime. The court noted that the police had no reason to secure defendant's car unless he was already in custody when the backup officer arrived, especially where the traffic stop involved a routine traffic violation. The court concluded that under these circumstances, it was clear that defendant was placed in custody and his vehicle searched based on the investigative alert.

Citing **People v. Hyland**, 2012 IL App (1st) 110966, the court concluded that the fact that a person is subject to an investigative alert shows at most that other officers might possess facts sufficient to support probable cause. The fact that other officers may have some unspecified probable cause doe not justify an investigative detention by officers who lack the specifics of the basis for the alert.

The court also noted the special concurrence of Justices Salone and Neville in **Hyland** "regarding the 'troubling' issue of the legality of the Chicago police department's policy of issuing investigative alerts." Here, the court stated, "This issue remains just as troubling as well as unresolved."

2. The court rejected the State's argument that even if the detention was improper, the seizure of the brick of cocaine was proper under the plain view doctrine. The plain view doctrine authorizes the police to seize an item without a search warrant when: (1) an officer views an object from a place where he or she is legally entitled to be; (2) the incriminating character of the object is immediately apparent; and (3) the officer has a lawful right of access to the object. The State maintained that the plain view discovery of the brick of cocaine constituted "intervening probable cause" and that the arrest was therefore not a fruit of the improper detention.

The court acknowledged that the plain view doctrine might have applied had the cocaine been discovered at the time of the stop by the officer who conducted the stop. Because police lacked any justification for placing defendant in custody, however, there was no reason for the backup officer to "secure" defendant's car. Thus, the seizure of the cocaine stemmed directly from the improper detention.

SENTENCING

§45-1(b)(2)

People v. House, 2015 IL App (1st) 110580 (No. 1-11-0580, 12/24/15)

1. The proportionate penalties clause of the Illinois Constitution requires that "all penalties shall be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.

2. Defendant was sentenced to a mandatory term of natural life imprisonment after being convicted of murdering two people. Defendant was 19 years old at the time of the offense. Although defendant was present and armed when the victims were surrounded and forced into a vehicle at gunpoint, he was not actually present at the scene of the murder and did not inflict any of the fatal shots. He merely acted as a lookout and was convicted based on a theory of accountability. There was also no evidence defendant helped plan the offense. Instead, defendant simply followed the orders of higher ranking gang members.

3. The Appellate Court held that the statute mandating natural life imprisonment was unconstitutional as applied to defendant due to his age and minimal involvement in the offense. While defendant was not a juvenile, the court found that his young age of 19 was an important mitigating factor. The court found that the qualities distinguishing juveniles from adults do not disappear at age 18 and there are significant differences between young adults like defendant and fully mature adults.

But under the mandatory life sentencing statute, court's are afforded no discretion in considering mitigating factors such as a defendant's young age and lack of full maturity. Given the facts of this case, the court found that the mandatory sentence of life imprisonment shocked the moral sense of the community and violated the proportionate penalties clause.

The court vacated defendant's sentence and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

§45-1(b)(2)

People v. Schweihs, 2015 IL 117789 (No. 117789, 12/3/15)

The court held that under its recent decision in **People v. Williams**, 2015 IL 117470, the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1),(a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2. Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

The court reversed the judgment of the circuit court declaring this section of the AUUW statute unconstitutional.

§§45-7(b), 45-7(c)

People v. Johnson, 2015 IL App (3d) 140364 (No. 3-14-0364, 12/23/15)

The imposition of fines is a judicial act. Because the clerk of the court has no power to levy fines, a fine imposed by the circuit clerk is void. A challenge to a void order imposing financial sanctions is not subject to forfeiture and may be raised for the first time in a reviewing court.

The court vacated several fines that had been imposed by the clerk and remanded the cause for the trial court to determine whether those fines should be imposed. In addition, "for the purpose of providing guidance to the trial courts" which are struggling with the "very complex process" of calculating fines and fees, the court issued an appendix concerning fines and costs.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

§45-9(c)(5)

People v. Wilson, 2015 IL App (4th) 130512 (No. 4-13-0512, 12/3/15)

1. Under **Graham v. Florida**, 560 U.S. 48 (2010), the "cruel and unusual punishment" clause of the Eighth Amendment is violated by a mandatory life sentence without the possibility of parole for a juvenile offender who did not commit a homicide. Here, the court concluded that **Graham** was violated by imposition of natural life sentences without the possibility of parole on three counts of predatory criminal sexual assault of a child which were committed about six months before defendant's 18th birthday. The natural life sentences were imposed under 720 ILCS 5/12-14.1(b)(1.2), which mandates sentences of life without parole for convictions of predatory criminal

sexual assault of a child which were committed against two or more persons, "regardless of whether the offenses occurred as the result of the same act or several related or unrelated acts."

2. The court rejected the State's request to affirm two natural life sentences for counts of predatory criminal sexual assault of a child which occurred after defendant turned 18. First, because both counts were committed against a single victim, they did not trigger natural life sentencing on their own.

Second, the court rejected the argument that the three counts on which the natural life sentences were vacated because the offenses occurred when defendant was a minor could be used to impose natural life sentences on the two counts which were committed after defendant turned 18. "It is contrary to the analysis in **Graham** to permit the conduct for which a defendant could not receive a life sentence to trigger a life sentence for a second offense, committed after defendant's 18th birthday."

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

§45-10(b)

People v. White, 2015 IL App (1st) 131111 (No. 1-13-1111, 12/16/15)

Defendant was charged with being an armed habitual criminal for knowingly or intentionally possessing a handgun after having been convicted of domestic battery and first degree murder. 720 ILCS 5/24-1.7(a) provides that a person is an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted two or more times of certain offenses, including "a forcible felony as defined in Section 2-8." Section 2-8 defines forcible felonies as several specified offenses "and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8.

1. Domestic battery is not listed as one of the specified offenses, and therefore may be a forcible felony only if: (1) the specific circumstances of the prior conviction in question actually involved the use or threat of physical force or violence, or (2) the offense falls within the residual clause because it inherently involves force or violence. Because the State failed to present evidence concerning the specific circumstances of defendant's domestic battery conviction, that conviction was a forcible felony only if domestic battery inherently involves the use or threat of force or violence.

The court noted that domestic battery can be based either on bodily harm or on physical contact of an insulting or provoking nature with a family or household member. (720 ILCS 5/12-3.2(a)) Clearly, domestic battery based on contact of an insulting or provoking nature does not inherently involve the use or threat of violence, and therefore is not a forcible felony.

By contrast, domestic battery based on inflicting bodily harm to a family or household member, "at first blush, . . . would appear to constitute a forcible felony." Considering the statute as a whole, however, the court concluded that it would be absurd to find that domestic battery based on bodily harm constitutes a forcible felony where §2-8 was amended in 1990 to provide that aggravated battery constitutes a forcible felony only if it is based on great bodily harm. The court concluded that in light of the 1990 amendments, the legislature could not have intended that domestic battery based on mere bodily harm qualified as a forcible felony.

Because defendant's aggravated battery conviction did not qualify as a forcible felony for purposes of the habitual criminal statute, the habitual criminal conviction was vacated.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

§45-10(d)

People v. Brown, 2015 IL App (1st) 140508 (No. 1-14-0508, 12/23/15)

Under 730 ILCS 5/5-4.5-95(b), "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony," and has two prior convictions for a Class 2 or greater Class felony, he "shall be sentenced as a Class X offender."

Defendant committed a Class 1 felony when he was 20 years old. He was still 20 years old when the State charged him with the offense. He turned 21 the next day and was 21 when he was convicted of the offense. He was sentenced as a Class X offender based on his two prior Class 2 felony convictions.

The Appellate Court held that defendant was not eligible to be sentenced as a Class X offender because he had not turned 21 when the State charged the offense.

The court noted that there was a split in authority about what constitutes the correct triggering event, with two cases (**People v. Stokes**, 393 Ill. App 3d 335 (1st Dist., 2009) and **People v. Williams**, 358 Ill. App 3d 363 (1st Dist., 2005)) holding it was the date defendant was convicted and another (**People v. Douglas**, 2014 IL App (4th) 120617) holding it was the date defendant was charged. The court "found persuasive" the reasoning of **Douglas**, which applied the "last antecedent rule" of statutory construction. Under that rule, qualifying phrases apply to the immediately preceding words, and hence the phrase "over the age of 21" applies to the word defendant. And since a person becomes a defendant only when charged with an offense, the triggering event is being charged, not committing the offense.

Nonetheless, the court ultimately held that the statute was ambiguous and thus employed the rule of lenity to interpret the statute in defendant's favor. The court remanded the case for re-sentencing as a Class 1 felony.

The dissent disagreed with the reasoning of **Douglas**, since the word "defendant" merely defines a person's status, not the time an event occurred. Instead, the dissent believed that the statute unambiguously made the date of conviction the triggering event.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

§45-13

People v. Thompson, 2015 IL 118151 (No. 118151, 12/3/15)

A defendant seeking relief under section 2-1401 must ordinarily file the petition within two years of the judgment being challenged. 735 ILCS 5/2-1401(a), (c). The two-year limitations period, however, does not apply when the petition challenges a void judgment.

Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry**, 2015 IL 116916.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant's claim was thus subject

to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

SEX OFFENSES

§46-7

People v. Avila-Briones, 2015 IL App (1st) 132221 (No. 1-13-2221, 12/24/15)

The Appellate Court rejected the defendant's request that it revisit whether the statutory scheme created by the Sex Offender Registration Act (730 ILCS 150/1 *et seq.*), the Sex Offender Community Notification Act (730 ILCS 152/101 *et seq.*), and statutes restricting the residency, employment, and presence of sex offenders constitute cruel and unusual punishment under the Eighth Amendment or disproportionate punishment under the Illinois Constitution. The court concluded that even if recent amendments to the statutory scheme constituted "punishment," the restrictions were not disproportionate to legitimate penological goals. In addition, the court concluded that the statutory scheme did not violate substantive or procedural due process.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

STATUTES

§48-1

In re Michael D., 2015 IL 119178 (Docket No. 119178, 12/17/15)

The same rules of construction apply to both statutes and Supreme Court Rules. When interpreting statutes and rules, the primary goal is to ascertain and give effect to the intent of the drafters. The most reliable indicator of the drafters' intent is the plain and ordinary meaning of the language used.

Where the language of a statute or rule is clear, it must be given effect without resort to other tools of interpretation. It is improper to depart from the plain language by creating exceptions, limitations, or conditions which conflict with clearly expressed legislative intent.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

§48-3(a)

People v. Avila-Briones, 2015 IL App (1st) 132221 (No. 1-13-2221, 12/24/15)

The Appellate Court rejected the defendant's request that it revisit whether the statutory scheme created by the Sex Offender Registration Act (730 ILCS 150/1 *et seq*.), the Sex Offender Community Notification Act (730 ILCS 152/101 *et seq*.), and statutes restricting the residency, employment, and presence of sex offenders constitute cruel and unusual punishment under the Eighth Amendment or disproportionate punishment under the Illinois Constitution. The court concluded that even if recent amendments to the statutory scheme constituted "punishment," the restrictions were not disproportionate to legitimate penological goals. In addition, the court concluded that the statutory scheme did not violate substantive or procedural due process.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

§48-3(a)

People v. Burns, 2015 IL 117387 (No. 117387, 12/17/15)

To succeed on a facial challenge, a plaintiff must establish that the law in question is unconstitutional in all applications. When assessing whether a statute meets this standard, a court will consider only scenarios in which the statute actually authorizes or prohibits the conduct at issue. "The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." **Planned Parenthood of Southeastern Pa. v. Casey**, 505 U.S. 833 (1992).

(Defendant was represented by Assistant Defender Adrienne N. River, Chicago.)

TRAFFIC

§50-1

People v. Grandadam, 2015 IL App (3d) 150111 (No. 3-15-0111, 12/2/15)

The offenses of driving while license revoked, operating an uninsured motor vehicle, and operating a motor vehicle without valid registration all require that the State prove that the defendant was operating a "motor vehicle." A "motor vehicle" is defined as a vehicle which is self-propelled or propelled by electric power obtained from overhead wires, "except for vehicles moved solely by human power, motorized wheelchairs, low-speed electric bicycles, and low-speed gas bicycles." 625 ILCS 5/1-146. A "low-speed gas bicycle" is a two or three-wheeled device with "fully operable pedals and a gasoline motor of less than one horsepower, whose maximum speed on a paved level surface, when powered solely by such a motor while ridden by an operator who weighs 170 pounds, is less than 20 miles per hour." 625 ILCS 5/1-140.15.

The court concluded that the State failed to prove beyond a reasonable doubt that defendant was operating a "motor vehicle." Defendant was riding a gas-powered bicycle which used both a gasoline motor and pedal power. Officers testified that they estimated defendant to be traveling at approximately 15 miles an hour, and that he was stopped for failing to obey a stop sign and for making an illegal left turn. After he was stopped, defendant stated that the bicycle could travel between 25 and 30 miles an hour and that he had once gotten it up to 41 miles per hour. The officers did not know whether the latter speed was reached while riding downhill.

Defendant testified that the gas motor provided .75 horsepower, that the bicycle must be pedaled to eight to 10 miles an hour before the motor can be activated, and that when using just the motor the bicycle's top speed was 17 miles per hour. The State presented no evidence concerning the bicycle's capabilities except for the statements defendant made to the officers after he was stopped.

The court concluded that the State presented insufficient evidence to allow a reasonable trier of fact to conclude beyond a reasonable doubt that the bicycle was a "motor vehicle" rather than a "low-speed gas bicycle." The court stressed that defendant's statements to police did not distinguish between the bicycle's capabilities when using only the motor and when using the pedals to assist. In addition, defendant's unrebutted testimony stated that when using only the motor, the maximum speed was 17 miles per hour, which was three miles below the maximum speed for "low-speed gas bicycles." Under these circumstances, the evidence was insufficient to prove beyond a reasonable doubt that defendant's bicycle was a "motor vehicle."

The court rejected the argument that the trial court could infer that defendant's statements after the stop meant that the bicycle could reach speeds of 25 to 30 miles per hour using only the motor. While a reviewing court will allow all reasonable inferences, the only evidence concerning the bicycle's speed when powered solely by the motor was defendant's testimony at trial. Defendant's general statements to the officers

are "simply not probative of the method by which the bicycle" reached speeds in excess of 20 miles per hour.

The convictions for driving while license revoked, driving an uninsured motor vehicle, and driving without valid registration were reversed.

UNLAWFUL USE OF A WEAPON

§53-1

People v. Burns, 2015 IL 117387 (No. 117387, 12/17/15)

1. The aggravated unlawful use of a weapon statute provides, in part:

> (a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> > (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person . . . [,] or
> >
> > (2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town . . .; and
> >
> > (3) One of the following factors is present:
> >
> > > (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense; . . .
> > >
> > > (C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card[.] . . .
>
> (d) Sentence. Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. 720 ILCS 5/24-1.6.

Thus, to convict of aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that the defendant was either carrying a firearm on his person

or in his vehicle (720 ILCS 5/24-1.6(a)(1)) or was carrying or possessing a firearm while on a public way (720 ILCS 5/24-1.6(a)(2)), and that one of the factors set forth in subsection (a)(3) was present. Under 720 ILCS 5/24-1.6(d), AUUW is a Class 4 felony unless the defendant has previously been convicted of a felony, in which case the offense is a Class 2 felony.

2. In **People v. Aguilar**, 2013 IL 112116, the Supreme Court held that §24-1.6(a)(1), (a)(3)(A) is facially unconstitutional because it constitutes a ban on the right to keep and bear arms under the Second Amendment. On rehearing, the court modified the opinion to state that the finding of unconstitutionality was limited to the "Class 4 form" of AUUW.

The court stated that there is no "Class 4 form" or "Class 2 form" of AUUW, and that it erred in the **Aguilar** modified opinion by limiting the opinion to the "Class 4 form" of the offense. The elements of AUUW are contained in subsection (a) of the statute, and the offense is complete when those elements are established. The distinctions between Class 4 and Class 2 are created by subsection (d) of the statute, which affects sentencing but does not create "separate and distinct" offenses of AUUW.

Thus, contrary to the modified opinion in **Aguilar**, §24-1.6(a)(1), (a)(3)(A) "is facially unconstitutional, without limitation." In other words, Section 24-1.6(a)(1), (a)(3)(A) cannot serve as the basis for an AUUW conviction of any class.

3. The court rejected the State's argument that §24-1.6(a)(1), (a)(3)(A) is not facially unconstitutional because it presents no constitutional problems when applied to persons with prior felony convictions. When assessing whether a statute is facially unconstitutional because it violates the constitution in all applications, a court will consider only scenarios in which the statute actually authorizes or prohibits the conduct at issue.

Because as enacted by the legislature the offense defined by §24-1.6(a)(1), (a)(3)(A) does not include as an element that the offender has a prior felony conviction, any possible application to prior felons could not be considered in deciding whether the statute is facially unconstitutional.

Defendant's conviction for aggravated unlawful use of a weapon was vacated.

(Defendant was represented by Assistant Defender Adrienne N. River, Chicago.)

§53-1

People v. Schweihs, 2015 IL 117789 (No. 117789, 12/3/15)

The court held that under its recent decision in **People v. Williams**, 2015 IL 117470, the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1),(a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2. Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

The court reversed the judgment of the circuit court declaring this section of the AUUW statute unconstitutional.

§53-3

In re Nasie M., 2015 IL App (1st) 151678 (No. 1-15-1678, 12/1/15)

1. When a defendant challenges the sufficiency of the evidence, the reviewing court must decide whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Generally, the trier of fact is in the best position to judge credibility and it is not the function of the reviewing court to retry the case. A finding of guilt will only be reversed where the proof was so improbable, implausible, or unsatisfactory that reasonable doubt exists.

2. Following a bench trial, defendant was convicted of several gun offenses, all of which required proof that he possessed a gun. The State's evidence showed that the police spoke with defendant at a vacant lot where he had been shot in the foot. Defendant was taken to the hospital and the police went to his girlfriend's apartment, where they found a gun under a mattress. The gun contained a live, unfired cartridge.

An officer interviewed defendant at the hospital where he was being treated and was on pain medication. Defendant initially told the officer that he had been shot by two assailants who were behind him. The officer observed that the wound was to the top of defendant's foot and questioned defendant's version of events. He also told defendant that a gun had been recovered from his girlfriend's house. Defendant then admitted the gun was his. He told the officer that he had been carrying the gun, accidentally shot himself in the foot and then took the gun back to his girlfriend's house.

Defendant, by contrast, testified that two men fired several shots at him as he attempted to flee from them. He had two gunshots wounds to the bottom of his foot and one wound to the top. The hospital gave him medication for his extreme pain, which

put him in and out of sleep. He did not recall speaking to any officers at the hospital and denied telling the police that he shot himself in the foot.

In finding defendant guilty, the trial court acknowledged that the police could have done a more thorough investigation, including testing defendant for gunshot residue and test-firing the gun. But the court found that the officer who questioned defendant was believable and defendant was not, and that defendant "admits shooting himself."

3. The Appellate Court reversed outright defendant's convictions for the weapons offenses holding that the State failed to prove that defendant possessed a firearm. The court observed that the State had provided no reason why defendant's admission that he possessed the gun should be presumed to be more credible than his trial testimony denying that possession. Moreover, the version of events in the admission were "not necessarily corroborated" by the other evidence. Under that version, defendant would have had to shoot himself in the foot, run or hop to his girlfriend's apartment, get rid of the gun, and then return to the scene of the shooting where he spoke to the police, all within a short span of time.

The court gave little weight to the significance of the officer's observation of a gunshot wound to the top of defendant's foot since the officer was not an expert in gunshot wounds. The court also noted the absence of eyewitness testimony, forensic evidence and medical evidence. The court thus concluded that the State failed to prove defendant's guilt beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

§53-3

People v. Moore, 2015 IL App (1st) 140051 (No. 1-14-0051, 12/16/15)

Defendant was convicted of unlawful possession of ammunition by a felon and possession of a controlled substance after police officers executed a search warrant for the home of defendant's great-grandmother. Defendant was observed jumping out a window as police approached the house. Officers recovered ammunition from a desk in the living room and from the basement rafters, and also found what they suspected to be cocaine in the rafters. In addition, in one of three bedrooms officers discovered mens' clothing and a letter that was addressed to the defendant at the house.

Defendant's great-grandmother testified that defendant did not live at the house, but that he had been at the house on the day of the search and had received mail there. In addition, defendant's sister and a friend testified that he did not live at the house.

The Appellate Court reversed the convictions, finding that the evidence failed to prove that defendant had constructive possession of the contraband.

1. Possession of contraband may be actual or constructive. Where the defendant was not observed in the presence of the recovered contraband, the State was required to prove constructive possession. To establish constructive possession, the State must show that the defendant had knowledge of the contraband and exercised immediate and exclusive control over the area where the contraband was found. Constructive possession can be proven by evidence that the defendant once had physical control over the contraband, intended to exercise control again, and did not abandon the items, and that no other person obtained possession.

Constructive possession is typically proved through circumstantial evidence such as acts, statements, or conduct which support an inference that defendant knew the prohibited items were present. In addition to knowledge, the State must prove that the defendant exercised immediate and exclusive control over the area where the contraband was found.

2. The court concluded that even taken most favorably to the State, the evidence did not establish that defendant had knowledge of the contraband. First, although officers found mail addressed to defendant and men's clothing in the bedroom, the contraband was not found in the bedroom. In addition, the mail had been postmarked more than six months earlier and the clothing was not specifically linked to defendant.

The court acknowledged that defendant fled as police approached, but noted that flight is only one factor and must be considered with all of the other evidence.

3. Even had the State proven that defendant knew of the contraband, there would have been insufficient evidence that he had immediate and exclusive control over the area where the contraband was found. Although residency at property where contraband is found may show control of the premises, there was insufficient evidence here to show that defendant lived on the premises. Not only was the letter found in the bedroom six months old, but the clothing was not shown to belong to defendant. In addition, defendant presented three witnesses who testified that he did not live at the house. Under these circumstances, defendant did not have exclusive control of the area where the contraband was found.

(Defendant was represented by Assistant Defender Robert Melching, Chicago.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§§56-1(a), 56-1(b)(4)(a)
People v. Hughes, 2015 IL 117242 (No. 117242, 12/17/15)

Defendant, who was charged with first degree murder, moved to suppress statements which he made during police interrogations after he was brought from Michigan to Chicago. The motion alleged several grounds, including that: (1) defendant was not properly advised of his **Miranda** rights, (2) defendant was incapable of appreciating and understanding the full meaning of **Miranda** rights, (3) the statements were obtained during interrogations which continued after defendant exercised his right to silence and/or elected to consult with an attorney, (4) the statements were obtained through psychological, physical and mental coercion, and (5) the statements were involuntary.

At the hearing on the motion to suppress, trial counsel acknowledged the breadth of the motion to suppress and stated that the defense would proceed on two theories: (1) that defendant's hands had been handcuffed in a very uncomfortable position for the 90-minute drive to Chicago, and (2) that detectives questioned defendant on that drive without informing him of his **Miranda** rights and without making a video recording. Trial counsel stated, "I just want to give notice to counsel those are the grounds we will be proceeding on."

The trial court denied the motion to suppress, finding that the statements were not coerced and that the detectives testified credibly that they had given defendant **Miranda** warnings. Defendant's post-trial motion stated that the trial court erred by denying the motion to suppress, without any amplification.

On appeal, defendant raised several issues concerning his statements, including that his statements were involuntary because he was 19 years old, had only a ninth grade education, had not done well in school, had little to no sleep at the time of the statement, was suffering from severe emotional distress due to the death of his grandfather, and was the victim of deceptive and coercive police conduct. Defendant also claimed that he was susceptible to suggestion due to substance abuse.

The Supreme Court held that the issues were waived because defendant had not presented them in the trial court.

1. Although the terms "forfeiture" and "waiver" have been used interchangeably, "waiver" is the voluntary relinquishment of a known right while "forfeiture" is the failure to comply with procedural requirements. Here, the claims which defendant raised on appeal, while not factually "hostile" to the claims raised in the trial court, were "almost wholly distinct" from the issues litigated at trial. Under these circumstances, the issues raised on appeal were not preserved.

The Supreme Court stressed that due to the differences between the issues raised in the trial court and on appeal, the trial court did not have an opportunity to consider and rule on the bulk of the challenges which defendant made on appeal. Likewise, the State did not have an opportunity to present evidence or argument concerning the challenges that were raised on appeal. Although a defendant need not present identical arguments in the trial court and on appeal, "almost entirely distinct" contentions are improper.

2. In a concurring opinion, Justices Burke, Thomas, and Kilbride noted that the majority failed to address defendant's plain error argument. However, the concurrence concluded that plain error did not occur.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

§56-1(b)(4)(a)

People v. Thompson, 2015 IL 118151 (No. 118151, 12/3/15)

Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period that ordinarily applies to 2-1401 petitions (735 ILCS 5/2-1401(a), (c)), and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry**, 2015 IL 116916.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant's claim was thus subject

to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

§§56-1(b)(5)(a), 56-1(b)(5)(c)

People v. Ealy, 2015 IL App (2d) 131106 (No. 2-13-1106, 12/29/15)

In a jury trial for first-degree murder, defendant adequately preserved the issue of the admissibility of his refusal to consent to DNA testing where he repeatedly argued in the trial court that the probative value of the evidence was substantially outweighed by the prejudicial effect. Although an issue is preserved for appellate review only where there is an objection at trial and the issue is included in the post-trial motion, the issue raised on appeal need not be identical to the objection raised at trial. Instead, a claim is preserved when it is clear that the trial court had an opportunity to rule on essentially the same issue.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

§56-2(a)

People v. Johnson, 2015 IL App (1st) 141216 (No. 1-14-1216, 12/23/15)

Entry of a conviction on a crime which is not a lesser-included offense constitutes second-prong plain error in that the fundamental right to notice of the charges is violated and the fairness of the trial and integrity of the judicial process are affected. The court rejected the argument that second-stage plain error is limited to the six "structural" errors identified by the U.S. Supreme Court, including: (1) complete denial of counsel; (2) biased trial judge; (3) racial discrimination in selection of grand jury; (4) denial of self-representation at trial; (5) denial of public trial; and (6) defective reasonable-doubt instruction. The court noted that the Illinois Supreme Court has not limited second-stage plain error to these six areas and has held that an error may be reversible even if it "was not within the class of 'structural' errors recognized by the [U.S.] Supreme Court."

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

§56-2(b)(1)(a)

People v. Cacini, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)

Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave IPI Criminal 4th No. 24-25.06, which provides the general definition of self-defense. However, the trial judge failed to also give IPI Criminal 4th No. 24-25.06A, which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to IPI Criminal 4th No. 24-25.06 instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 651(a).

Under the plain-error doctrine, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

Although defense counsel failed to tender IPI Criminal 4th No. 24-25.06A, failed to timely object to the absence of the instruction, and failed to include the issue in his post-trial motion, the Appellate Court concluded that the trial judge's failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party's closing argument clarified the burden of proof and the State's closing argument could easily have been misinterpreted.